

ORIGINAL COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA...

FILED
HARRISBURG
 MAY 14 2001
 MARY E. D'ANDREA, CLERK
 Per DEPUTY CLERK

JEFFERY P. MOSER

(Plaintiff)

Vs.

KENNETH KYLER, ET. AL.,

(Defendants)

Civil NO # 1:00-CV-1846

Jury Trial Demanded

Judge William W. Caldwell

* DECLARATION IN OPPOSITION TO DEFENDANT'S MOTION FOR
DISMISSAL FOR FAILURE TO EXHAUST ADMEN. REMEDIES... *

JEFFERY PAUL MOSER DECLARES UNDER THE PENALTY OF PERJURY:

1.) I AM THE PLAINTIFF OF THE ABOVE MENTIONED CASE, I MAKE THIS DECLARATION IN opposition TO DEFENDANTS MOTION TO DISMISS.

2.) THE DEFENDANTS CLAIM THAT MOSER FAILED TO STATE A CLAIM IN WHICH RELIEF COULD BE GRANTED UNDER (R.C.P. (12)(B)(6). MOSER DISAGREE'S, MOSER BELIEVE'S HE CLEARLY HAS ESTABLISHED VIOLATION OF THE CONSTITUTION AND OF OTHER LAWS THE COURT CAN ENFORCE,

IN EXAMPLE: (AMERICANS WITH DISABILITIES ACT OF 1990 - 42 U.S.C. 12182) IT HAS ALSO BEEN RULED 8TH AMEND. VIOLATIONS, TO DENY DISABLED PRIS MEDICAL TREATMENT, THERAPY, A.D.A. HOUSING, ETC. (HICKS V. FREY, 94 F.2d 1450, 1956-57 (6th cir. 1993) (WEEKS V. CHARBONDY, 984 F.2d 185, 187-88 (6th cir. 1993) (* ARMSTRONG V. WILSON, 124 F.3d 1019, (9th cir. A.D.A. AND R.A. APPLIES TO INMATES IN STATE CORR. INST.) (* PENNA. D. VS. YESKEY, 118 S.Ct. 1952 (1998) PLEASE TEXT OF TITLE II OF THE AMERICA WITH DISABILITIES ACT OF 1990 UNAMBIGUOUSLY EXTENDS TO STATE PRISON FORMATE (ESTELLE VS. GAMBLE, 429 US. 97, 50 LE2d 251, 97 S.Ct 285 (1976) ELEMENT PRINCIPLES OF CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMEND ESTABLISH THE GOVERNMENTS OBLIGATION TO PROVIDE MEDICAL CARE →

FOR THOSE WHOM IT IS PUNISHING BY INCARCERATION.) ALL ENCLOSED (IN EXAMPLE) SECTION OF THIS DECLARATION IN REFERENCE TO CASELAW AND STANDING REGULATIONS "APPLIES" TO MOSER COMPLAINT AND SHOWS A CLEAR NEED FOR THE HONORABLE COURT HEAR THIS CASE AND DENY THE DEFENDANTS MOTION TO DISMISS", AS THERE ARE CONSTITUTIONAL VIOLATIONS, IN WHICH RELIEF CAN BE GRANTED, AS A CLAIM HAS BEEN PROPERLY STATED, AND MOSER FEELS THE HONORABLE COURT WOULD FAVOR OF HAVING THIS CASE HEARD, AS DISMISSAL IS A VERY HARSH PENALTY AS STATED IN: (JOHNSON VS. U.S. DEPT. OF TREASURY, 939 F.2D 820 (9TH CIR. 1991)) (HERNANDEZ VS. CITY OF EL MONTE, 138 F.3D 3 (9TH CIR. 1998)) ("DISMISSAL IS HARSH PENALTY AND, THEREFORE, SHOULD BE IMPOSED IN EXTREME CIRCUMSTANCES") FURTHERMORE, MOSER WITHOUT COUNSEL AND WITH HIS DISABILITIES HAS DONE ALL THAT COULD REASONABLY BE EXPECTED OF HIM, TO STATE A CLAIM AND EXHAUST ALL HIS REMEDIES (ADMINISTRATIVE) WITH THIS IN MIND THE COURT MOSER BELIEVES DEFENDANTS MOTION SHALL BE DENIED. (HIGHERIA N. BANK VS. CHICAGO TRANSIT AUTHORITY, 774 F.2D 766 (7TH CIR. 1985)) (VS. U.S., 378 US 199, 12 LED2D 760, 84 S. CT 1689 (1964)).

3.) THE DEFENDANTS CLAIM MOSER (PLAINTIFF) DID NOT EXHAUST ALL HIS ADMINISTRATIVE REMEDIES THROUGH THE INMATE GRIEVANCE SYSTEM (DC-ADM 804) IN VIOLATION OF TITLE 42 U.S.C. 1997 (E) (A) AND 3602 (A) OF THE PRISONERS LITIGATION REFORM ACT. THE PLAINTIFF ENTERED OPPOSITIONS TO THIS ALLEGATION, AS THE PLAINTIFF MOSER DID IN FACT EXHAUST ALL AVAILABLE REMEDIES MAKE AVAILABLE TO HIM AT S.C.I. FRACKVILLE AND S.C.I. HUNNINGDON AND SUBMITTED SUCH TO COURT WITH HIS COMPLAINT. PLEASE REFER TO PAGE (7 OF 9) 3 (8 OF 10) OF THE COMPLAINT WHICH STATES IN PART WHY DIANA BANEY, PAT YAG, KENNETH KYLER ARE DEFENDANT IN THIS ACTION. IT WAS THERE PROVEN BY THEIR ACTIONS, THAT IF THEY JUST DIDN'T ANSWER AND/OR ACKNOWLEDGE, REQUEST, COMPLAINTS AND GRIEVANCES, →

(CONTINUED)

and/or sent them back "unrecorded (or) un-numbered" with a Broff Rate Random Statement, stating a Grievance could not be filed in this matter because Ms. Yager should be contacted first, when in fact Ms. Yager was contacted and NEVER RESPONDED. That exhaustion could not be and if Moser did seek litigation, they would just claim Moser to exhaust his remedies. By this standard as long as Ms. Yager did not respond Mrs. Baney would ~~NOT ACKNOWLEDGE~~ (or) docket any grievance and on (0136-00) the only (of many) grievance file that got answered by Mrs. Baney it was NOT TIMELY ANSWER by Mr. Kyler and EVER ANSWERED by the Head Hearing Examiner Robert Bitner. So I feel he did everything within his power and requirements of F.R.A. D.O.C. and Federal Rules of Civil Procedure to exhaust ALL AVAILABLE ADMINISTRATIVE REMEDIES. FURTHERMORE, NO WHERE in 48 U.S.C. 1997, (or) 3626 P.L.R.A. (or) DC-ADM-804 does it state that if a Prison official just REFUSE to acknowledge and/or answer complainant's request for grievance in violation of the Due Process clauses of the U.S. Constitution, they can have the Prisoner Civil Litigation dismissed for failure to exhaust and escape all responsibility there actions within the Honorable Court. All exhibit's of exhaustion have been submitted to the Court, and if reviewed by the Honorable Court, it will see Moser even filed a grievance about Mrs. Yager refusing to answer grievances. IN: CLWIN VS. F.U.S., 144 F.2d 505, (7th Cir. 1998) Agencies must respond to the arguments made to them.

Moser, made every effort to meet exhaustion standards till his effort had become "Futile" (unanswered request, and/or grievance) the Court has stated: (Exhaustion of Administrative Remedies is NOT required where it would be futile.) (McCarthy vs. Madigan, 112 F.3d 1086-88) (Tallahassee Memorial vs. Cook, 109 F.3d 693 Cir. 1997) (Patsey vs. Board of Regents, 102 S. Ct 2557 (1982))

Therefore Moser has exhausted all remedies, and the Defendants motion for "Dismissal" should be DENIED.

(continue)

4.) MOSER DECLARES ALSO TO THE HONORABLE COURT THAT ATTORNEY "SHAWN P. KENNY" STATES IN HIS MOTION THAT "ALL GROUNDS ARE SET FORTH IN THE SUPPORTING BRIEF". MOSER HAS NOT RECEIVED A COPY OF THE "SUPPORTING BRIEF" TO DATE (2ND DAY OF MAY 2001) ENTER HIS OPPOSITION, BUT CAN NOT ARGUE WHAT HE HAS NOT SERVED WITH.

5.) MOSER ASK'S THE HONORABLE TO TAKE IN TO CONSIDERATION MOSER IS A UNTRAINED PRO-SE LITIGANT AND WILL ONCE AGAIN ASK FOR RE-CONSIDERATION ON APPOINTMENT OF COUNSEL MOTION AT A LATER DATE, AS MOSER CAN SHOW THE HONORABLE COURT HE HAS CONTACTED SEVERAL ATTORNEYS, BUT AT THIS TIME CAN NOT AFFORD COPIES TO SAID MOTION. UNTILL THEN MOSER ASK THE COURT TO REFERENCE THE FOLLOWING: (SPENCER VS. DOE, 139 F.3D 107 (2ND CIR. 1998)) (GREEN VS. BRAWSON, 111 108 F.3D 1296 (10TH CIR. 1997)) WHEN CONSIDERING THE PLAINTIFF'S LEGAL SUBMISSIONS.

6.) IN MOSER "REQUEST FOR APPOINTMENT OF COUNSEL" THE OPINION FROM THE HONORABLE DID STATE THIS ACTION HAD ARGUEABLE MERIT AND "SUFFICIENT EVIDENCE".

* WHEREFORE, OPPOSITION IS HEREBY ENTERED, AND THE PLAINTIFF PRAYS THE HONORABLE COURT WITH "DENY" DEFENDANT'S MOTION FOR DISMISSAL AND THIS CASE WILL BE SET FOR TRIAL IN THE INTEREST OF JUSTICE. THANK YOU KINDLY.

Pursuant to 28 U.S.C. 1746:

5/3/01
(DATED)

Scott Whit
SCOTT WHIT (WITNESS)

Respectfully Submitted,

Jeffery Paul Moser
JEFFERY PAUL MOSER (PLAINTIFF)

IN THE UNITED STATES DISTRICT COURT, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JEFFERY P. MOSER

VS.

KENNETH KYLER ET. AL.

CASE NO. # 1:00-CV-1846

* CERTIFICATE OF SERVICE *

I, JEFFERY PAUL MOSER, HEREBY CERTIFY THAT I HAVE ON THIS DAY SERVED A COPY OF THE BELOW-REFERENCED DOCUMENT(S) UPON THE PERSONS AND IN THE MANNER BELOW:

* Declaration in opposition to Defendant motion for Dismissal *

SERVICE BY FIRST CLASS MAIL ADDRESSED AS FOLLOWS:

■ SHAWN P. KENNY ESQ.
OFFICE OF CHIEF COUNSEL
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CAMPHILL PA. 17011

■ JAMES D. YOUNG ESQ.
P.O. Box 1245
HARRISBURG, PA. 17108-1245

■ (2 COPIES MAIL SEPARATE)
CLERK OF COURT
U.S. DISTRICT COURT
228 WALNUT ST
P.O. Box 983
HARRISBURG, PA 17108

SWORN TO UNDER THE PENALTY OF PERJURY 28 U.S.C. 1746.

Jeffery Paul Moser
(WITNESS)

Respectfully Yours,

Jeffery Paul Moser
JEFFERY PAUL MOSER (PLAINTIFF)
5/3/01
(DATE)